

Statement of U.S. Representative Edward J. Markey (D-MA)
Ranking Democrat, House Subcommittee on Telecommunications and the Internet
Hearing on the Proposed Nextwave Settlement
December 11, 2001

Good Afternoon. I want to commend Chairman Upton for calling this hearing this afternoon on the proposed Nextwave settlement and I thank our witnesses for coming.

The chief reasons supporters give for endorsing the settlement are as follows: 1) it ends legal wrangling; 2) it puts the spectrum in the market; 3) it gives the government a financial boost of some \$10 billion; and 4) it's better than any alternative. Let me take each in turn.

First, the legal wrangling. I think a quick glance at the settlement document would indicate to anyone that the lawyers have approached the job of eliminating legal claims on the licenses and limiting corporate liability in future lawsuits with particular industriousness. In fact, they have in all likelihood "lawyered" themselves out of time. If we are truly interested in ending legal wrangling, however, Congress should consider changes to the settlement. The brokered agreement still doesn't address what was ostensibly the root cause of all the litigation in the first place – namely, the authority of the FCC to cancel licenses and extricate them from companies in default. Second, Congress should assess whether similarly situated companies should be part of the settlement, either as a matter of assuring legal finality, or as a matter of equity in public policymaking.

Second, putting the spectrum in the market. It's hard not to approach this argument without engaging in "I told you so" rhetoric. One wonders why this argument was not persuasive to the Commission in 1997, 1998, 1999 and 2000, when in that year Nextwave agreed to pay everything it owed, plus interest, along with an offer to provide special services to schools in their markets. Suffice it to say that we've waited 5 years to get the spectrum in the market. Whether it happens now or a few months from now is less important in my view than how it comes into the market.

Third is the fiscal policy argument: that the government stands to gain \$10 billion. In the alchemy of Federal budget scoring, this number is totally illusory. This is another reason why I find it wholly inappropriate, from an institutional perspective, for the FCC to become a fiscal policy advocate back to Congress and its own oversight committee. The Commission should leave "cooking the books" on spectrum revenues and budget scoring to OMB – that's their job – and instead, should root itself in fulfilling its statutory directives from Congress on these matters.

The fact is that C-Block revenue has already been accounted for in previous and current budgets. You can't count as so-called "new" money the roughly \$500 million Nextwave deposit. That was "booked" and counted some years ago. With respect to the rest of the money, OMB and CBO have been counting on all or part of it for years.

As a matter of Congressional fiscal implications, the Congressional Budget Office (CBO) already had an estimate for C-block revenues this year. The CBO reached this number by splitting the difference on the relative outcomes if the government won its case or lost its case. In other words, if the government won, it would get the \$16 Billion from the bidders in auction 35; if it lost, it would get approximately \$6 Billion from Nextwave in principal plus interest and penalty payments. Splitting the difference, the CBO estimated C-Block revenue at \$11 Billion.

Now, if we take the proposed settlement, with its \$16 Billion payment from the companies, and then subtract the \$9.55 Billion appropriation that Congress must make for Nextwave's portion, that leaves a

net gain of \$6.45 Billion. Compare that with the \$11 Billion that was already in congressional budget estimates and we arrive at a net shortfall of about \$4.5 Billion.

So what is the fiscal implication of this settlement? Not a \$10 Billion gain at all. The cold truth is that if the settlement were introduced as is, and brought to the House floor, the CBO would score the bill as costing the government \$4.5 billion. We can quibble about whether we believe this is an accurate representation of income and outlay, but that's the way the government counts it.

Which brings us to the final argument, which is that this settlement may be unpalatable, but the alternatives are worse. One of the most troubling things about this settlement to me is that it represents the abandonment of any pretense of sound telecommunications policy in favor of a financial settlement, where the FCC intervenes to broker an agreement between potential licensees, and where the overriding objective is seemingly about getting more money.

A more suitable alternative might be one that better meets the objectives of congressionally-developed spectrum policy as articulated in Section 309(j) of the Communications Act. Advocates for the deal have mentioned getting the spectrum into the market and recouping a portion of its value for the taxpayer. Yet the statute also includes, as equally important goals, the promotion of economic opportunity and competition, the wide distribution of licenses and avoidance of excessive concentration of licenses, as well as the admonishment to avoid unjust enrichment in the methods employed to award uses of the resource. When you consider all of the statutory telecommunications policy objectives, of which auction revenue is but one, it becomes clear that while the corporate interest is well represented in the agreement, the public interest has not yet been fully served.

Congress would do well to further examine this settlement with more time next year. At that time, we could address issues more comprehensively and also confront the lingering legal tension between communications law and bankruptcy law. Otherwise, Congress may have to act on every failed enterprise holding spectrum licenses into the foreseeable future.

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